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No. 96-779

In the

Supreme Court of the United States

October Term, 1996

ARKANSAS EDUCATIONAL TELEVISION COMMISSION,

Petitioner,

v.

RALPH P. FORBES,

Respondent.

On Writ of Certiorari
in the United States Court of Appeals
for the Eighth Circuit

BRIEF OF THE STATE OF NEW JERSEY AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Peter Verniero
Attorney General of New Jersey
Attorney for State Respondent
R.J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625
(609) 292-8567

Joseph L. Yannotti
Assistant Attorney General
Counsel of Record and
On the Brief

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INTEREST OF AMICUS CURIAE

The State of New Jersey files this amicus brief to bring to the Court's attention its statutory scheme regarding televised interactive debates for gubernatorial candidates, which are conducted under the jurisdiction of the New Jersey Public Broadcasting Authority, a state agency. Pursuant to state statute, participation in these debates is limited to those gubernatorial candidates who qualify for public financing. That is the singular criterion for participation. As such, neither a candidate's political party affiliation, political philosophy or electoral viability are relevant considerations. This scheme is constitutionally valid because it is based upon

an objective criterion. It is neither viewpoint-restrictive nor content-based.

Accordingly, it is in New Jersey's interest that the Court's ruling in this case neither implicates nor renders suspect the validity of this state's provisions for providing qualified gubernatorial candidates with an additional and meaningful opportunity to express their views to the electorate, to allow for a well-informed exercise of the franchise.

SUMMARY OF ARGUMENT

The state-sponsored televised gubernatorial debates in New Jersey are a unique and integral part of the state's public financing scheme for qualifying candidates. These debates further the state's compelling interest in expanding electoral opportunities for candidates with limited financial means. By way of the debates, such candidates are provided an additional avenue of access to the public to discuss their political ideas and philosophy. Notably, participation in these debates is based upon an objective criterion of qualifying for public financing, by having raised and expended a requisite amount of private contributions. Participation, therefore, is not based upon the political affiliation or viewpoint of the candidates. Nor is participation subject to the decision of those persons responsible for the state broadcasting authority. This statutory scheme, therefore, does not permissibly infringe upon any recognized right. Accordingly, whatever the Court may decide as to the televised debate process at issue in Forbes v. Arkansas Education Commission that decision should not cast doubt on the constitutionality of New Jersey's process for televised debates.

ARGUMENT

THE STATE OF NEW JERSEY'S STATUTORY SCHEME FOR TELEVISED GUBERNATORIAL DEBATES IS CONSTITUTIONALLY VALID UNDER A FIRST AMENDMENT ANALYSIS BECAUSE PARTICIPATION IN THESE DEBATES IS NOT VIEWPOINT-RESTRICTIVE; RATHER IT IS BASED UPON THE OBJECTIVE CRITERION OF QUALIFICATION FOR PUBLIC FINANCING.

Under the First Amendment, the extent to which a state may regulate speech is usually dependent upon the setting or forum in which such rights are sought to be exercised. The Court has held that in the context of a traditional forum where all members of the public have access for expressive speech, such as the "village green," the state's regulation of forum access must be narrowly tailored and further a compelling state interest. See Perry Education Association v. Perry Local Educations' Association, 460 U.S. 37, 45 (1983). A similar limitation applies if a state creates a "limited public forum" which is to be used for a particular purpose or limited to a particular class of speakers. Perry, supra at 46. In the case of a non-public forum, i.e., a setting not traditionally open for expressive activity, the state may impose restrictions that are reasonable and rationally-based. Even in a non-public forum, however, it has been held that a state may not suppress expression because it opposes the speaker's views. Cornelius v. NAACP Legal Defense and Education Fund, 473 U.S. 788, 800-801 (1985).

In this case, petitioner, the Arkansas Educational Television Commission, appeals from the decision of the Eighth Circuit Court of Appeals that its decision-making process for participation in televised candidate debates is constitutionally-flawed. 93 F.3d 497 (8th Cir. 1996). This controversy originated with the petitioner's decision to limit participation in the televised debates for the congressional

candidates for the Third Congressional District of Arkansas to those candidates representing the Democratic and Republican parties. Respondent Ralph Forbes, an independent congressional candidate, was, therefore, excluded from the debate.

Forbes filed suit against the Commission alleging that its decision violated his rights of freedom of speech and expression under the First Amendment. The Court of Appeals held that the debates in question were a limited public forum and that the Commission had impermissibly infringed upon the First Amendment rights of Forbes because its decision to exclude him was based upon its subjective determination that he was not a viable candidate. 93 F.3d 504. The Court of Appeals concluded that the Commission's determination was viewpoint-restrictive and, therefore, was not legally sufficient under the First Amendment. 93 F.3d at 505.

New Jersey's system is distinguishable from that at issue in this matter, and the Court should be aware of those differences in deciding this case. In New Jersey, the Legislature has provided for televised debates for gubernatorial candidates, which are conducted under the auspices of the New Jersey Public Broadcasting Authority. These debates are an integral component of the State's public financing scheme for gubernatorial candidates. The legislative intent of such financing is set forth in N.J. Stat. Ann. 19:44A-27, as follows:

> It is hereby declared to be a compelling public interest and to be the policy of this State that primary and general election campaigns for the office of Governor shall be financed with public support pursuant to the provisions of this act.

Under current law, a gubernatorial candidate qualifies for public financing if he or she raises and expends a

minimum of $210,000, see N.J. Stat.Ann. 19:44A-3(m); N.J. Adm. Code 25:15.3. Qualification for public financing is the triggering element for participation in the debates. The specific statutory provision regarding these debates is set forth in N.J. Stat.Ann. 19:44A-45, in relevant part:

> a. In any year in which a primary election is to be held to nominate candidates for the office of Governor, there shall be held among the several candidates for each such nomination a series of interactive gubernatorial primary debates, in which all "qualified candidates,"...for that nomination who have applied or who intend to apply to receive money for election campaign expenses ...shall participate, and in which any other candidate for that nomination who has...the amount necessary, ...to be deemed a "qualified candidate" may elect to participate,...
>
> b. In any year in which a general election is to be held for the office of Governor, there shall be held a series of interactive gubernatorial election debates, in which all "qualified candidates,"...for election to that office who have applied or who intend to apply to receive money for election campaign expenses...shall participate, and in which any other candidate for election to the office who has deposited and expended the amount necessary,...to be deemed a "qualified candidate" may elect to participate.... [N.J. Stat. Ann. 19:44A-45; emphasis added].

As plainly set forth in N.J. Stat. Ann. 19:44A-45, any qualified candidate who does apply for public financing or intends to apply for public financing is obligated to participate in the debate. Any qualified candidate who chooses to forgo public financing is, nevertheless, entitled to participate in the gubernatorial debates sponsored by the

Authority. N.J. Stat. Ann. 19:44A-45. As noted by the New Jersey Supreme Court in McGlynn v. New Jersey Public Broadcasting Authority, 88 N.J. 112, 125, 439 A.2d 54 (1981), the television access provided by the above statute is an additional means to further the intent of the state's public financing scheme to assist candidates of limited access.

New Jersey's statutory provisions for televised gubernatorial debates were challenged in Arons v. Donovan, 882 F. Supp. 379 (D.N.J. 1995). In that case, Marilyn Arons, a 1993 independent gubernatorial candidate who did not qualify for public financing, filed suit in the United States District Court for the District of New Jersey against several state entities, including the New Jersey Public Broadcasting Authority, regarding the televised coverage of that year's gubernatorial campaign. Part of the relief Arons sought was inclusion in the gubernatorial interactive debates, in spite of her failure to qualify for matching funds. Under First Amendment analysis, the court determined that the New Jersey Public Broadcasting Authority was a "limited public forum" in terms of the televised gubernatorial debates. 882 F. Supp. at 388. Any decision to exclude participation could not, therefore, be "viewpoint restrictive" Ibid. The court found that the plaintiff's exclusion from the debates was solely based upon her failure to qualify for matching funds, as required by N.J. Stat. Ann. 19:44A-45. 882 F. Supp. at 390. The Court held that "This itself is a viewpoint-neutral reason for excluding plaintiff from the debates." Ibid.

While the court in Arons chose to view the debates as a limited public forum, we submit that New Jersey determined whether its gubernatorial debate scheme is constitutionally viable considered to be a limited public forum or non-public forum. Eligibility for inclusion in the debates is by operation of law, based upon a candidate's ability to obtain the requisite financial support which qualifies him or her for

public financing. It is an objective criterion under any conceivable analysis which does not offend any constitutional right of a candidate. It is distinguishable, therefore, from Forbes, and the Court's ruling in this case should not reach New Jersey's statutory scheme.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted whatever the Court may decide in the Forbes case, should not cast doubt on the constitutionality of New Jersey's statutory scheme for televised gubernatorial debates.

Respectfully submitted,

Peter Verniero
Attorney General of New Jersey
Attorney for State Respondent

Joseph L. Yannotti
Assistant Attorney General
R.J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625
(609) 292-8567

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